



1 right to appeal a sentence within or below the guidelines or any  
2 other aspect of the conviction or sentence, and waived all  
3 collateral challenges, including under 28 U.S.C. § 2255, except  
4 non-waivable ineffective assistance of counsel claims. (Doc. #52  
5 at 4, 13).

6 On May 1, 2013, the court accepted the binding plea and  
7 sentenced defendant to a term of 96 months imprisonment on the  
8 armed robbery counts and a consecutive term of 84 months on the  
9 firearm count.

10 On April 30, 2014, defendant filed the instant motion for  
11 relief under 28 U.S.C. § 2255. Defendant's motion asserts several  
12 claims of ineffective assistance of counsel against two of his  
13 attorneys. The court by this order addresses only one: defendants'  
14 claim that attorney Richard Molezzo failed to file a notice of  
15 appeal on defendant's behalf despite defendant requesting that he  
16 do so.

17 Ineffective assistance of counsel is a cognizable claim under  
18 § 2255. *Baumann v. United States*, 692 F.2d 565, 581 (9th Cir.  
19 1982). In order to prevail on a such a claim, the defendant must  
20 satisfy a two-prong test. *Strickland v. Washington*, 466 U.S. 668,  
21 687 (1984). First, the defendant must show that his counsel's  
22 performance fell below an objective standard of reasonableness.  
23 *Id.* at 687-88. "Review of counsel's performance is highly  
24 deferential and there is a strong presumption that counsel's  
25 conduct fell within the wide range of reasonable representation."  
26 *United States v. Ferreira-Alameda*, 815 F.2d 1251, 1253 (9th Cir.  
27 1986). Second, the defendant must show that the deficient  
28 performance prejudiced his defense. *Strickland*, 466 U.S. at 687.

1 This requires showing that "there is a reasonable probability that,  
2 but for counsel's unprofessional errors, the result of the  
3 proceeding would have been different. A reasonable probability is  
4 a probability sufficient to undermine confidence in the outcome."  
5 *Id.* at 694.

6 Defendant asserts that he told Molezzo he wanted to file an  
7 appeal but Molezzo failed to do so. A "lawyer who disregards  
8 specific instructions from the defendant to file a notice of appeal  
9 acts in a manner that is professionally unreasonable." *Roe v.*  
10 *Flores-Ortega*, 528 U.S. 470, 477 (2000). "[W]hen counsel fails to  
11 file a requested appeal, a defendant is entitled to resentencing  
12 and an appeal without showing that his appeal would likely have had  
13 merit." *Sandoval-Lopez*, 409 F.3d at 1197 (quoting *Peguero v.*  
14 *United States*, 526 U.S. 23 (1999)). This is true even where the  
15 defendant has waived his right to appeal. *Id.* at 1198.

16 The court has two options when a defendant asserts his  
17 attorney failed to file a requested appeal. Either it may conduct  
18 an evidentiary hearing to determine whether the defendant's  
19 allegation is true, or, if the government does not oppose, it may  
20 "assum[e] without deciding that the petitioner's claim is true" and  
21 "vacate and reenter the judgment without a hearing and allow the  
22 appeal to proceed." *Id.*

23 Here, the government has elected to not oppose defendant's  
24 petition in this limited respect, believing it more efficient to  
25 allow defendant to file his appeal than to proceed with an  
26 evidentiary hearing. Accordingly, assuming without deciding that  
27 defendant asked Molezzo to file a notice of appeal and that Molezzo  
28 did not do so, the court hereby **VACATES** the judgment entered on May

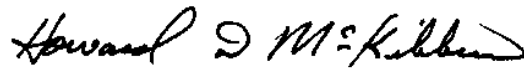
1 8, 2013, and directs that judgment be reentered forthwith.

2 Defendant is advised that once judgment has been reentered, he will  
3 have fourteen days within which to file his notice of appeal.

4 As the judgment will be vacated and reentered, the remainder  
5 of defendant's § 2255 petition is **DENIED WITHOUT PREJUDICE**, to  
6 renew following resolution of the defendant's appeal.

7 **IT IS SO ORDERED.**

8 DATED: This 13th day of November, 2014.

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11 UNITED STATES DISTRICT JUDGE  
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